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## Coherence and faith: constitutional interpretation by Akhil Amar and Philip Bobbitt\*

### *Coerência e fé: interpretação constitucional por Akhil Amar e Philip Bobbitt*

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#### Abstract

The approaches to constitutional interpretation of Professors Akhil Amar and Philip Bobbitt provide a window into the field of the American legal debate. This paper offers an analysis of the jurisprudence of two of the greatest constitutional scholars of our days, confronted in two axis of significant value for scholars: *who* should interpret and *what* should be interpreted. In determining the range of authoritative interpretation in the judiciary and beyond, and limiting the body of materials available for interpreters in remarkably different ways, these scholars provide a wide and precise picture of the constitutional landscape while also indicating how radically different approaches to interpretation may pursue the same principled ends.

**Keywords:** constitutional interpretation; catholic; protestant; faith; indeterminacy.

#### Resumo

As abordagens dos Professores Akhil Amar e Philip Bobbitt quanto à interpretação constitucional oferecem uma janela para o campo do debate jurídico americano. Esse artigo apresenta uma análise da doutrina de dois dos maiores juristas do direito constitucional de seu tempo, confrontando-se em dois eixos de valor significativo para estudiosos: quem deve interpretar e o que deve ser interpretado. Ao determinar o alcance da interpretação válida no judiciário e além, e limitar o conjunto de materiais disponíveis para os intérpretes de formas notadamente distintas, esses juristas oferecem uma visão ampla e precisa do cenário constitucional, ao mesmo tempo em que demonstram como abordagens radicalmente distintas quanto à interpretação podem aspirar principiologicamente aos mesmos fins.

**Palavras-chave:** interpretação constitucional; católico; protestante; fé; indeterminação.

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\* Akhil Amar and Philip Bobbitt are Professors of Law at, respectively, Yale Law School and Columbia Law School. They annually teach a seminar at Yale on the topic of "Constitutional Interpretation", as a student of which I explored most of the themes covered in this paper. I thank both Professors for generously commenting on earlier drafts, as well as my colleagues in the seminar, for the enriching discussion of the topic.

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*Interpretation is not an occasional, post facto supplement to understanding; rather, understanding is always interpretation, and hence interpretation is the explicit form of understanding.<sup>1</sup>*

## 1. INTRODUCTION

The issue of constitutional interpretation has been in the center of legal debate in America for the better part of the 20<sup>th</sup> century (and all the lived part of the 21<sup>st</sup>). A significant number of the great legal minds of the last eighty years have dedicated time and effort to the question of interpretation, and offered answers that range on both extremes of the political spectrum and to all corners of legal possibility. The jurisprudences of Professors Philip Bobbitt and Akhil Amar both fall under this extremely wide umbrella but, as was to be expected when accounted differences in formation, historical context and opinion, offer very different approaches to constitutional interpretation.

This difference must be understood, foremost, on *time frame*. Over twenty years stand between the publication of Professor Bobbitt's first book on interpretation, *Constitutional Fate*<sup>2</sup>, and Professor Amar's *America's Constitution: A Biography*<sup>3</sup>. Both Professors have, naturally, published before and since on the issue of interpretation. But the decades the set apart these larger projects of constitutional solutions must be understood in a legal, historical and political time frame. When Bobbitt wrote *Constitutional Fate* in the late 1970s, the great question of American Constitutional Law was judicial review. By then the progressive decisions of the Warren and early Burger Courts had left a profound mark of the political and legal spectrum, and jurists on the left and right alike turned to such decisions in producing scholarship designed to either justify their fundamentals and scope or definitely rebuff them as unauthorized violations of the constitutional order<sup>4</sup>. The second decade of the 21<sup>st</sup> century, on the other hand,

<sup>1</sup> GADAMER, Hans-Georg. **Truth and Method**. London: Bloomsbury Academic, 2013.

<sup>2</sup> BOBBITT, Philip. **Constitutional Fate: Theory of the Constitution**. New York: Oxford University Press, 1984.

<sup>3</sup> AMAR, Akhil Reed. **America's constitution: a biography**. New York: Random House, 2006.

<sup>4</sup> The on-going constitutional debate that sprung from this particular historical period is worthy of note. On the right, one of the great critical instruments in this period was democracy. The counter-majoritarian difficulty of judicial review (See BERGER, Raoul. **Government by judiciary**. Indianapolis: Liberty Fund, 1997), arguing that judicial review of legislation - approved by a democratically elected Congress - by a group of unelected judges impaired the democratic principle and threatened the liberty of the American people.) became a

was inaugurated in a new era of the realm of constitutional theory. The dilemma of judicial review, although far from resolved in the minds of respectable constitutional scholars, has been largely placed aside in the pursue of new challenges<sup>5</sup>. The approach to constitutional interpretation has been dissociated, albeit incompletely, from the context of courts in contemporary legal scholarship<sup>6</sup>. In this new context of scholarly debate, it is notable how often the exercise of interpretation, as repeatedly seen in Professor Amar's books, is entirely independent from the interpretative efforts of the Supreme Court<sup>7</sup>.

Understanding that these scholarly enterprises are products of different times, and even to some extent designed to answer different questions does not, however, invalidate or preclude a comparative effort between them. In fact, the richness of the ideas presented in the works of both authors and the functional value of the solutions they offer makes such comparative enterprises a timeless exercise. In this paper I utilize a useful analogy in illuminating the differences and similarities between these disparate approaches to constitutional interpretation; in the process, I hope to clarify both

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weapon in the hands of opponents of the progressive Supreme Court of the 1950s, 60s and 70s. The great heritage of the right of this period, in the realm of constitutional interpretation, is originalism as defended by men like Robert Bork (see BORK, Robert H. **The Tempting of America**. New York: Free Press, 1997) and Edwin Meese. The left, of course, was not silent; but it was, perhaps, less united in its approach to judicial review. Theories of interpretation justifying the use of judicial review, especially in the protection of civil rights, were presented by progressive law professors who wished to legitimate the legacy of the Warren Court (See BICKEL, Alexander. **The Least Dangerous Branch: The Supreme Court At The Bar Of Politics**. New Haven: Yale University Press, 1986; FISS, Owen M.. *Objectivity and Interpretation*. **Stanford Law Review**, San Francisco, 34, p. 739–763, 1982; ELY, John Hart. **Democracy And Distrust: A Theory Of Judicial Review**. Cambridge: Harvard University Press, 1980). But the left also turned on itself as scholars of the Critical Legal Studies movement sought to deconstruct justifying legal theories – including the ones that supported their own political preferences. See UNGER, Roberto Mangabeira. **The Critical Legal Studies Movement: Another Time, A Greater Task**. London: Verso, 2015; TUSHNET, Mark V. **Red, White, And Blue: A Critical Analysis Of Constitutional Law**. Lawrence: University Press of Kansas, 2015. Reva Siegel and Robert Post have suggested that this united theoretical front on the right – not replicated on the left – can account for the remarkable influence originalism practiced by right wing has exerted in America in the last decades. See SIEGEL, Reva; POST, Robert. *Democratic Constitutionalism*. In: **The Constitution in 2020**. New York: Oxford University Press, 2009. Most of these remarkable changes in the field of constitutional interpretation have taken place precisely in the period that separates Constitutional Fate and America's Constitution: A Biography. And they will be shown to have a significant influence in the ideological differences in between Amar's and Bobbitt's approaches to interpretation.

<sup>5</sup> See BALKIN, Jack M., **Critical Legal Theory Today**, Rochester, NY: Social Science Research Network, 2008.

<sup>6</sup> New approaches to constitutional interpretation focus on the power of social and political movements in shaping constitutional meaning inside and outside of courts, rather than the reasoning of judges. See BALKIN, Jack M., **Living Originalism**. [s.l.]: Belknap Press, 2014. See also ACKERMAN, Bruce, *The Living Constitution*, **Harvard Law Review**, v. 120, n. 7, p. 1737–1812, 2007. POST, Robert; SIEGEL, Reva, *Roe Rage: Democratic Constitutionalism and Backlash*, **Harvard Civil Rights-Civil Liberties Law Review**, v. 42, p. 373, 2007.

<sup>7</sup> In discussing matters such as abortion and the use of contraceptives, Professor Amar engages in demonstrating how the 14th and 19th amendments have provided the Constitution with new standards of equality for women that necessarily translate in new approaches to matters such as sexuality and child bearing in the United States. In doing so, he does not engage with the argumentative line utilized by the Supreme Court to resolve the same line of cases, in which a doctrine of privacy rights was created from the concepts of liberty and due process. AMAR, Akhil Reed. **America's Unwritten Constitution: The Precedents and Principles We Live By**, Reprint edition. [s.l.]: Basic Books, 2015. p. 277.

how these authors speak to each other and to other scholars engaged in the debate of constitutional interpretation. For such, in Part I I will present the analogical tools developed in the work of Professor Sanford Levinson<sup>8</sup> and elaborate my hypothesis of how they apply to the works of Professors Amar and Bobbitt; in Part II, I will attempt to address some possible problems and questions my hypothesis generates, and in Part III I will explore the consequences of the ideological and normative differences between the author's theories, and what I believe brings them together.

## 2. THE INFLUENCE OF FAITH IN LAW: CATHOLIC AND PROTESTANT APPROACHES TO CONSTITUTIONAL INTERPRETATION

In 1987, Professor Sanford Levinson published *Constitutional Faith*<sup>9</sup>, an exploratory work of law and political theory that sought to illuminate nuances of theory and practice in these fields by the means of analogies between law and religion. One of the most fascinating features of this enterprise were the analogical standards offered in the comparison of the different approaches to constitutional interpretation, derived from Christian approaches to the interpretation of the bible. Levinson sought to explain how Catholics and Protestants differed on both the sources of authority and the basis of interpretation for biblical teachings; while the catholic tradition developed throughout the centuries a doctrinal support to the biblical text, derived from the "independent authority of oral tradition", Protestantism sought to reinstate the bible as the one true source of God's authoritative power. And whereas in Catholic tradition the church was the one true source of interpretative authority, Protestantism wished to vindicate the power of individual conscience, allowing every man to interpret the sacred text in the search of guidance for spiritualism and behavior.

In the realm of constitutional interpretation, Levinson devised two variables: (a) reliance solely on the text of the constitution as a source of authority in which to base interpretation or (b) understanding doctrine, or unwritten traditions, to be sources of constitutional law along with the written text; and (c) understanding an institutional authority (in this case the Supreme Court) as the ultimate dispenser of interpretative power or (d) recognizing the legitimacy of individualized ("or at least nonhierarchical communal") interpretation. He stresses that there is "no logical connection between Constitution-identity and who is to be the authorized interpreter of the Constitution"<sup>10</sup>, signaling that one could position oneself as a Catholic in regards to one of the variables and as Protestant to the other.

<sup>8</sup> LEVINSON, Sanford, **Constitutional Faith**. Princeton, N.J: Princeton University Press, 2011.

<sup>9</sup> LEVINSON, Sanford, **Constitutional Faith**. Princeton, N.J: Princeton University Press, 2011.

<sup>10</sup> LEVINSON, Sanford, **Constitutional Faith**. Princeton, N.J: Princeton University Press, 2011. p. 29.

In fact, Professor Levinson then goes to show how different constitutional scholars have often chosen opposite sides of the spectrum in each of the variables, just as others have stayed “pure” in their Catholic or Protestant approaches. However, I must state a point of disagreement with Professor Levinson (himself self-declaredly a man of “split” preferences<sup>11</sup>) as to the inexistence of any logical connection in between the substantive basis for interpretation and the source of interpretative authority, for I believe such a basis exists – and moreover, that while it does not impede the reality of acceptable *split* theories, it endows purists with a greater sense of coherence and functional value, an argument I intent to explore throughout this paper.

That being said, it is necessary to disclosure that the best way of reading the variables proposed by Levinson is as ideal types, as suggested by Professor Amar when engaging in a similar exercise<sup>12</sup>. Therefore, even amongst those who would align their interpretative preferences with the same strain of religious analogy on both variables, dissimilarities are natural and do not disparage the fundamental differentiation of the analysis. As noted by Professor Amar:

*The difference lies in emphasis and attitude. Those who privilege the document do not ignore precedent altogether. (How could they, given that the text itself suggests a role for judicial exposition?) Conversely, those who privilege precedent concede that the text does sometimes matter - on rare occasions, they have even been caught reading the Constitution. (Hasn't the Court itself suggested that constitutional precedents must often yield if later adjudged contrary to the document?) In some sense, we are all documentarians; we are all doctrinalists.*<sup>13</sup>

Such dissimilarities will be noticed in all of the examples, provided by Professor Levinson and elsewhere, of how interpretative theories have applied each of the variables in the ideal types. And in those examples, interestingly enough, split theories are more common than pure ones. Levinson’s primary example of a pure textualist of the Protestant variety is Justice Hugo Black (who was also described as the champion of textual argument by Professor Bobbitt in *Constitutional Fate*<sup>14</sup>), who apart from

<sup>11</sup> As noted by Professor Amar in AMAR, Akhil Reed. Civil Religion and Its Discontents. **Tex. L. Rev.**, v. 67, p. 1153–1591, 1989, p. 1155.

<sup>12</sup> In comparing doctrinalists and documentarians, two categories of constitutional interpreters that speak to the first of Professor Levinson’s variables. See AMAR, Akhil Reed. The Document and the Doctrine. **Harvard Law Review**, v. 114, 2000, p. 27.

<sup>13</sup> AMAR, Akhil Reed. The Document and the Doctrine. **Harvard Law Review**, v. 114, 2000.

<sup>14</sup> Professor Bobbitt explains textualism as developed by Black stating that: “Black developed the textual argument, and a set of supporting doctrines, with a simplicity and power they had never before had. His view was that the Constitution has a certain number of significant prohibitions which, when phrased without qualification, bar any extension of governmental power into the prohibited areas. A judge need not decide whether such an extension is wise or prudent; and as such a non-decider, he is a mere conduit for the prohibitions of the

defending the text of the Constitution as the only source of interpretative substance did not challenge judicial authority, causing Levinson to label him “protestant-catholic”. On the category of doctrinalists, or Catholics as to what actually constituted “the Constitution”, the most notorious candidate suggested by Levinson is Ronald Dworkin, whose work is famous for advocating morality as a source of constitutional principles, and also for the figure of Hercules, or the ideal judge<sup>15</sup>. Levinson notes, however, that “Hercules could just as easily be an ordinary citizen as a justice of the United States Supreme Court. All that Dworkin requires is that this adjudicator be someone seriously committed to the Constitution (...)”<sup>16</sup>.

Dworkin and Black are striking examples because they are extremely committed to their respective ends on the first variable, but do not remain within the same “category” in regards to *who* has interpretative authority over the Constitution. Other examples follow this pattern. In his own analysis of doctrinalists and documentarians, Professor Amar points to John Hart Ely as a documentarian, or a Protestant of the first variety; but Ely is not a critic of judicial supremacy. In fact, his theory was designed to justify the exercise of judicial review within a structural framework<sup>17</sup>.

Nevertheless, there are obviously some purists to be found in the legal realm. One example (by both Amar and Levinson) is Justice John Marshall Harlan, a committed doctrinalist or Catholic (of both varieties). Harlan advocated the role of tradition as a valid source of constitutional law, while reaffirming the supreme authority of the Court to recognize the meaning of the Constitution informed by it. The other purist presented by Professor Levinson, in true Protestant fashion, was neither a judge nor even a lawyer, but Frederick Douglass, a slave-turned-abolitionist that rejected both the Supreme Court’s interpretation of the Constitution about slavery and widespread tradition as a source of doctrinal authority. Douglass emphasized the textual character of the Constitution, but radically denied the supremacy of the Supreme Court as an interpreter<sup>18</sup>, once he believed its interpretations were not based in the only true source of substantive authority, the constitutional text.

The question that remains is how do the works of Professors Amar and Bobbitt fit into the framework suggested by Levinson. Let us first examine the variable that Professor Amar himself proposed to divide documentarians and doctrinalists. In such

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Constitution”. BOBBITT, Philip. **Constitutional Fate: Theory of the Constitution**. New York: Oxford University Press, 1984. p. 31.

<sup>15</sup> DWORKIN, Ronald, **Taking Rights Seriously**. Cambridge: Harvard University Press, 1978.

<sup>16</sup> LEVINSON, Sanford, **Constitutional Faith**. Princeton, N.J.: Princeton University Press, 2011. p. 42.

<sup>17</sup> ELY, John Hart, **Democracy and Distrust: A Theory of Judicial Review**. Cambridge: Harvard University Press, 1980.

<sup>18</sup> LEVINSON, Sanford, **Constitutional Faith**. Princeton, N.J.: Princeton University Press, 2011. p. 51.

a framework, Professor Amar is a self-declared documentarian *first* and doctrinalist second<sup>19</sup>. By this he means that he seeks “inspiration and discipline in the amended Constitution’s specific words and word patterns, the historical experiences that birthed and rebirthed the text, and the conceptual schemas and structures organizing the document.”<sup>20</sup> To the extent that Protestantism is understood as an ideal type, Professor Amar is most definitely Protestant, willing to “wring every drop of possible meaning from constitutional text, history and structure...”<sup>21</sup> before ever resorting to sources of doctrine.

Professor Bobbitt has a clearly different approach. He clearly and repeatedly states that in his theory the different modalities of argument have no hierarchy between them<sup>22</sup>. He does not *favor* doctrine over text, as so many interpretative Catholics do. In fact, he is willing to insist that the interpretative results using any of the modalities is equally legitimate, and therefore recognizes the authority of sources such as precedents (doctrinal argument) and ethos (ethical argument). This suffices in characterizing him as someone who recognized the independent authority of tradition, to use Levinson’s terms<sup>23</sup>, and therefore a Catholic.

The second variable is more fluid and harder to determine. As Levinson notes on religious grounds, it certainly cannot be that Protestantism rejects *all* church authority. Instead, what exists is “a strong push to a radically deinstitutionalized relationship between the individual believer and the God revealed in scripture”<sup>24</sup>, and therefore “it is up to each member of the faith community who feels touched by God’s saving grace to decide what the Word actually requires”<sup>25</sup>. In law, this relationship between individual and institutionalized authority is even subtler.

Back to ideal types, it is not the case that Protestants refuse to recognize the authority of the Supreme Court as an interpreter of the Constitution, not that Catholics are absolutely court-centered. But to the extent that differences exist, they will be noticed in emphasis and, I shall argue, a general coherence with the substantive basis of a theory of interpretation. Protestants of the second variety may be more willing to recognize individual or nonhierarchical interpretations against the Supreme Court. Levinson cites as examples of this President Andrew Jackson and Attorney General Edwin Meese, both public figures vested in authority, but that actively proclaimed to have

<sup>19</sup> AMAR, Akhil Reed. The Document and the Doctrine. **Harvard Law Review**, v. 114, 2000. p. 27.

<sup>20</sup> AMAR, Akhil Reed. The Document and the Doctrine. **Harvard Law Review**, v. 114, 2000. p. 26.

<sup>21</sup> AMAR, Akhil Reed. The Document and the Doctrine. **Harvard Law Review**, v. 114, 2000.

<sup>22</sup> See BOBBITT, Philip C. **Constitutional Interpretation**. Cambridge: Blackwell Pub, 1991. See also BOBBITT, Philip. Reflections Inspired by My Critics. **Texas Law Review**, v. 72, 1993.

<sup>23</sup> LEVINSON, Sanford, **Constitutional Faith**. Princeton, N.J.: Princeton University Press, 2011. p. 23.

<sup>24</sup> LEVINSON, Sanford, **Constitutional Faith**. Princeton, N.J.: Princeton University Press, 2011. p. 25.

<sup>25</sup> LEVINSON, Sanford, **Constitutional Faith**. Princeton, N.J.: Princeton University Press, 2011. p. 25–26.



equal authority to the United States Supreme Court in interpreting the Constitution. In describing the episode of President Jackson's veto of the Second Bank, Professor Amar has quoted him expressing that "the Congress, the executive, and the court must each for itself be guided by its own opinion of the Constitution...the opinion of the judges has no more authority over Congress than the opinion of Congress has over judges; and on that point the President is independent of both."<sup>26</sup>

Catholics in this variety are easier: they believe the Supreme Court has the ultimate authority to interpret the Constitution, and while other actors in the polity may disagree and engage in debate on constitutional matters, only the Court's interpretation is a source of legitimate authority. In this sense, I will argue that Professor Bobbitt's theoretical framework is consistent with a Catholic approach on the second variety, while Professor Amar's is consistent with a Protestant approach. That would make both Professors purists in Levinson's proposed varieties, on opposite sides of his spectrum: Amar would be "protestant-protestant" and Bobbitt "catholic-catholic".

This is a large claim, and I want to break it into three fragments, which will be explored in the next parts of this paper. For now I will state the features of Professors Amar and Bobbitt's theories that seem to be consistent with my proposed classification of their work on Levinson's second variety. In Part II I will address the qualities of their work that seem inconsistent with my proposed classification on both varieties, and try to assess whether they undermine it. Then in Part III I will return to the effects and consequences of this classification in comparing the Professor's works.

Classifying Professor Bobbitt as a Catholic as to who has the authority to interpret the Constitution goes back to the very purpose of his work. In *Constitutional Fate*, and again in introducing *Constitutional Interpretation*, Professor Bobbitt proclaims to be analyzing the legitimacy (in *Constitutional Fate*) and justification (in *Constitutional Interpretation*) of judicial review. His work is designed to explain why constitutional interpretation performed by judges is legitimate, and why a system in which constitutional interpretation is performed by judges is just. His is not a work that proposes to change the system, or to disclaim it: in this sense it is redemptive<sup>27</sup> because it seeks to explain how and why the system works, and can continue to work.

Professor Amar's work is redemptive in a different way. He pays considerably less attention to judicial review, while stressing on several points severe disagreement with the interpretations provided by the Supreme Court on constitutional provisions. If, however, his work is critical, his criticism is directed at the Supreme Court and not

<sup>26</sup> AMAR, Akhil Reed. **America's constitution**: a biography. New York: Random House, 2006. p. 185.

<sup>27</sup> The extent to which theories of law can be redemptive, and how they relate to the idea of faith in the Constitution (however one understands the Constitution to be) is leniently explored by Professor Jack Balkin in BALKIN, Jack M. **Constitutional Redemption: Political Faith in an Unjust World**. Cambridge: Harvard University Press, 2011.

at the Constitution. Just as Frederick Douglass (as he is described by Levinson)<sup>28</sup>, he can assert the legitimacy of an interpretation that is contrary *both* to existing traditions and to the interpretation provided by the Supreme Court. Professor Amar's faith in the Constitution (to use another fundamental expression in Levinson's work) is much more related to the Founding Document as he understands it and interprets it than to how the United States Supreme Court has shaped it.

I now turn to the (several) questions raised by my proposed classifications, as I aim to deepen my analysis of Professors Bobbitt and Amar's theories of constitutional interpretation.

### 3. REVERSING MISCONCEPTIONS

The claims I am making in classifying the interpretative theories of Professors Bobbitt and Amar can and have been challenged not only by the authors themselves, but also by others that have studied their work. Without presuming to sum or adequately respond to every strain of criticism, in this part I hope to address some misleading features of their work, which could lead us to assume, in a first analysis, the presence of Protestantism or Catholicism where in reality there is none.

#### 3.1. Bobbitt as an interpretative Protestant: language and conscience

In reviewing *Constitutional Interpretation* in 1993, Professor Levinson himself (writing with Professor Jack Balkin) has declared that Professor Bobbitt was "deeply protestant in his approach to constitutionalism and constitutional interpretation"<sup>29</sup>. This statement was produced in the characterization of Professor Bobbitt by his reviewers as a *constitutional grammarian*, someone invested in a project to determine the rules of the constitutional language game and, therefore, allow all actors in the system to play and excel on it. According to Levinson and Balkin:

*Bobbitt wishes to empower all the members of the legal system, including not only judges but also legislators, executive officials, and especially laypersons, to engage in constitutional interpretation. To this end, Constitutional Interpretation is offered basically as a primer that will quickly teach ordinary citizens how to interpret the U.S. Constitution. Even if they know nothing of constitutional doctrine or the specifics of constitutional history, they can still participate in the practice of constitutional interpretation because they can make textual, structural, ethical, and prudential arguments.*<sup>30</sup>

<sup>28</sup> LEVINSON, Sanford. **Constitutional Faith**. Princeton, N.J.: Princeton University Press, 2011. p. 31.

<sup>29</sup> BALKIN, J. M.; LEVINSON, Sanford. Constitutional Grammar. **Texas Law Review**, v. 72, p. 1771, 1993. p. 7.

<sup>30</sup> BALKIN, J. M.; LEVINSON, Sanford. Constitutional Grammar. **Texas Law Review**, v. 72, p. 1771, 1993. p. 6–7.

While it is certainly true that Professor Bobbitt's description of the modalities of constitutional argument can be read as an attempt to define and differentiate constitutional language from all other forms of language – such as political and moral language, for instance – and bestow legitimacy only on the first, Professor Bobbitt's primary interest in this construction is not allowing everyone to make constitutional arguments, but legitimating the arguments made by judges in interpreting the Constitution. This is not to say, of course, that Professor Bobbitt does not desire or recognize the importance of the usage of constitutional language by other actors in the polity. But so far as the locus of *authority* (and so the focal point of determining whether his approach is Catholic or Protestant in Levinson's terms) is concerned, Bobbitt is clear in separating interpretations by judges from those made by everyone else.

Responding directly to Professors Levinson and Balkin, Professor Bobbitt differentiates between constitutional *discourse* and constitutional *argument*, the latter being an activity confined to those persons whose decisions must be explained in terms of legal arguments, and the first being an activity that may include legal argument, but that is not confined by it<sup>31</sup>. For Bobbitt non-institutional interpretations of the Constitution, even if they utilize constitutional language, are not decisions according to law. His entire framework of legitimacy and justification is concerned with the decisions of judges, with a system in which the Supreme Court has the final word on constitutional interpretation.

This differentiation is fundamental, for instance, in allowing Professor Bobbitt to account for the legitimacy of the six modalities of argument and only of those; for Bobbitt, these modalities are legitimated by practice, but not the practice of all the actors in the polity engaged in constitutional discourse (which would perhaps make necessary to include new modalities which are quite common in constitutional debate, such as arguments based on morality or on natural law<sup>32</sup>). Instead the normative element that defines what constitutes constitutional arguments<sup>33</sup> is their confinement to the described practices of *judges* who, in the exercise of judicial review, make such arguments. These features of Professor Bobbitt's work make clear that he does not question judicial supremacy as a source of constitutional interpretation.

A final note must be made to the role of conscience in Professor Bobbitt's jurisprudence. Conscience is a very important feature of Protestant religious tradition, as the utmost guide to an individual seeking to understand for himself the commands

<sup>31</sup> BOBBITT, Philip. Reflections Inspired by My Critics. *Texas Law Review*, v. 72, p. 1869, 1993.

<sup>32</sup> BOBBITT, Philip. Reflections Inspired by My Critics. *Texas Law Review*, v. 72, p. 1869, 1993. p. 1923–1924.

<sup>33</sup> Bobbitt observes that in selecting the six modalities “this normative element is not a legal matter, but comes from an anthropological, historical, and empirical assessment of what arguments appear to re-occur in legal texts and oral arguments.” BOBBITT, Philip. Reflections Inspired by My Critics. *Texas Law Review*, v. 72, p. 1869, 1993. p. 1922.

of God in the sacred text. Conscience became a necessary tool to provide guidance to those who no longer had the Church *telling* them what the Bible meant. This ideology, at once liberating and indeterminate, plays a fundamental role in Professor Levinson's distinction in the realm of constitutional law. To him, interpretative Protestantism is a way to preserve conscience *against* authority<sup>34</sup>.

Professor Bobbitt's role for conscience in interpretation is, however, somewhat distinct. The role of conscience in traditional Protestant thought – and in Professor Levinson's analogical of interpretative Protestantism – is quite large and significant; conscience replaces doctrine, to a large extent. It is the guide that orients those who seek to interpret the sacred text, or the Constitution, observing only the text itself. It allows every man to form his own mind about what the Constitution means. In Professor Bobbitt's work, conscience is the last resort in a long and complex system of interpretative sources, in which the six modalities of argument are available for consultation – text, history, structure, precedent, prudence, ethos; these modalities will often offer conflicting solutions, within themselves (when historical argument, for instance, can be made to support two different claims, depending on the historical source the interpreter is utilizing, or when prudential argument supports two different interpretations because there is doubt on what the best economic and political consequences are) and amongst each other. In each case, Professor Bobbitt offers the interpreter guidance as to how to proceed. In the first case, when there is conflict within a modality, the rules of constitutional argument themselves will help to determine which is the best possible argument that modality can provide. In the second case, when the modalities conflict, Professor Bobbitt recognizes a role for conscience<sup>35</sup>.

For conscience, which is manifest *only* when the modalities conflict, Professor Bobbitt reserves the role of justice in the system of judicial review. For him justice is a changing, evolving matter; in this sense, one can only justify a system of judicial review by certain standards in a certain point in time. The traditional approach to justification, that would adopt a certain concept of justice and then apply it to the results of constitutional decision-making, could therefore only achieve ephemeral results (what has made Roberto Unger, as quoted by Professor Bobbitt, say that "...they could not be made coherent without freezing into place"<sup>36</sup>). For Bobbitt, a system of judicial review can only be consistently and continually justified by the role of conscience. Conscience, as applied to hard cases, allows for a just system even if it does not always provide just

<sup>34</sup> This analysis of the role of conscience in Levinson's work is explained in its clearer terms by Professor Balkin in BALKIN, Jack M. **Constitutional Redemption: Political Faith in an Unjust World**. Cambridge: Harvard University Press, 2011. p. 95–96.

<sup>35</sup> BOBBITT, Philip C. **Constitutional Interpretation**. Cambridge: Blackwell Pub, 1991. p. 112–170.

<sup>36</sup> See UNGER, Roberto Mangabeira. **The Critical Legal Studies Movement: Another Time, A Greater Task**. London: Verso, 2015.

decisions because it recognizes the indeterminacy of justice. Unless all could be persuaded to accept a single theory or conception of justice – something unlikely in the theoretical, and virtually impossible in the practical – society will never agree on what is just.

Understanding justice and rightness to be independent from the achievement of *truth* that is unique and universally applicable is also a trait of Protestantism. But it does not make Professor Bobbitt a *constitutional* protestant in any of the two variables proposed by Levinson in *Constitutional Faith*. He believes that doctrine (or unwritten traditions) are just as authoritative sources of interpretation as the text itself, recognizing no hierarchy within the modalities of argument. And he does not challenge judicial supremacy in constitutional interpretation, so far as he sees only judges to be bound by restraints of constitutional argument and charged with the duty of exercising conscience in face of hard decisions, allowing for a interpretative system that is legitimate and just.

### 3.2. Amar as an interpretative catholic: America's *unwritten Constitution*

The publishing *America's Unwritten Constitution* alongside *America's Constitution: a Biography* seems to raise questions on the classification of Professor Amar as an interpretative Protestant, at least in relation to the first variable proposed by Levinson. After all, isn't the definition of an interpretative catholic in regards to the substantive source of interpretative legitimacy someone who recognizes both the written text and unwritten traditions? So far as Catholicism and Protestantism are understood as ideal types, not quite. Levinson places due emphasis in the Catholic convention of placing *independent* authority in oral tradition, which was understood to be in *coequal* status with scripture<sup>37</sup>.

It is not just that Professor Amar has recognized his belief in the importance of being a documentarian first and a doctrinalist second – whereas that might be enough to classify him as a Catholic of the first variety. In the introduction to *America's Unwritten Constitution*, he asks "How can Americans be faithful to a written Constitution even as we venture beyond it? What is the proper relationship between the document and the doctrine – that is, between the written Constitution and the vast set of judicial rulings purporting to apply the Constitution?"<sup>38</sup> and almost immediately observes that "... the written Constitution itself invites recourse to certain things outside the text – things that form America's unwritten Constitution. When viewed properly, America's

<sup>37</sup> LEVINSON, Sanford. **Constitutional Faith**. Princeton, N.J.: Princeton University Press, 2011. p. 18.

<sup>38</sup> AMAR, Akhil Reed. **America's Unwritten Constitution: The Precedents and Principles We Live By**, Reprint edition. [s.l.]: Basic Books, 2015. p. x.

unwritten Constitution supports and supplements the written Constitution without supplanting it.”<sup>39</sup>

He goes on to describe the invitation contained in the Ninth Amendment to find rights that are not textually enumerated, as an example of the written text authorizing the exploration of the unwritten realm in search of its proper and full meaning. While getting ready to explore the unwritten features of the Constitution, he recognizes that precedents may be overruled and unwritten customs may ebb away, but “the written Constitution itself operates on a higher legal plane, and a clear constitutional command may not as a rule be trumped by a mere case, statute, or custom.”<sup>40</sup> Therefore, Professor Amar willingness to explore the unwritten Constitution – even his belief that such exploitation is necessary to unveil the true meaning of certain Constitutional provisions – causes him to recognize neither the *independent* authority of unwritten traditions nor its *equal* status to the written Constitution.

Can, however, Professor Amar be as easily recognized as a Protestant of the second variety? In his work, he does not reject the authority of the Supreme Court, nor does he offer express appreciation for other sources of interpretative authority. But the intense and heartfelt defense of his own interpretations all throughout it, his belief in their authority as they are derived from the text and his direct correlates – history and structure – are significant in understanding his approach to authority and legitimacy. Just as Frederick Douglass described by Levinson, Amar is willing to recognize the legitimacy of his interpretations despite the Supreme Court – against the Supreme Court.

This approach is remarkably similar to the system envisioned by Professor Jack Balkin in *Living Originalism*<sup>41</sup>. In preaching fidelity to text and principle in his framework originalism, Professor Balkin is not only advising observance to text *before* and *above* construction. He is also advocating that Protestantism in its second variety allows for the continuance and legitimacy of the system, because people who hold different views about what the constitutional text means can see their own interpretations as legitimate and hope to redeem their views in the future. According to Balkin:

*When political and social movements succeed in persuading other citizens that their interpretation is the right one, they replace an older set of implementing constructions and doctrines with a new one. These constructions and implementations may not be just or correct judged from the standpoint of later generations, and they can be challenged later on. But that is precisely the point. In every generation, We the People of the United*

<sup>39</sup> AMAR, Akhil Reed. **America's Unwritten Constitution: The Precedents and Principles We Live By**, Reprint edition. [s.l.]: Basic Books, 2015. p. x–xi.

<sup>40</sup> AMAR, Akhil Reed. **America's Unwritten Constitution: The Precedents and Principles We Live By**, Reprint edition. [s.l.]: Basic Books, 2015. p. xii.

<sup>41</sup> BALKIN, Jack M., **Living Originalism**. [s.l.]: Belknap Press, 2014.

*States make the Constitution our own by calling upon its text and its principles and arguing about what they mean in our own time. That is how every generation connects its values to the commitments of the past and carries forward the constitutional project of the American people in the future.*<sup>42</sup>

While it cannot be affirmed from his work in *America's Constitution* and *America's Unwritten Constitution* that Professor Amar fully shares Balkin's views on the role of constitutional interpretation in redeeming democracy, it seems fair to reconcile his project with Balkin's notion – borrowed from Levinson in *Constitutional Faith*<sup>43</sup> – of the role of Protestant interpretation in constitutional redemption and the maintenance of constitutional faith. By committing to his own project of constitutional interpretation, one that preaches fidelity to the text first and doctrine second, Professor Amar maintains deep belief in the legitimacy of his interpretations. This belief allows him to believe in the Constitution – in the political project it represents, in its ideals and principles, and in modern Americans' abilities to vindicate them – even when the United States Supreme Court deviates completely from his own view.

#### 4. FAITH IN THE CONSTITUTION AND THE COHERENCE OF PURIST THEORIES

Having explored the most important nuances that connect Professors Bobbitt and Amar's works to the classifications of Levinson's ideal types, I hope to be able now to investigate some of the consequences of the revealed distinctions in the author's approaches to constitutional interpretation. My first point is about constitutional faith – since Professor Levinson's work has been a recurring theme in this paper – and how these interpretative theories are different in their understanding of the Constitution and its legacy. My second point is about coherence, and it will explore how these interpretative theories are similar, and speak a distinctively more comprehensible language than many of its counterparts.

Faith is a main theme in Sanford Levinson's jurisprudence, and as Professor Balkin has drown out<sup>44</sup>, his distinction between Catholic and Protestant approaches to interpretation directly relates to the idea of faith in the Constitution. Levinson strongly opposes the idea of constitutional idolatry, or the blind belief in the Constitution for being the Constitution, and regardless of the results it delivers. As he states:

<sup>42</sup> BALKIN, Jack M., *Living Originalism*. [s.l.]: Belknap Press, 2014.p. 11.

<sup>43</sup> BALKIN, Jack M., *Living Originalism*. [s.l.]: Belknap Press, 2014. p. 77. See also BALKIN, Jack M. Idolatry and Faith: The Jurisprudence of Sanford Levinson. *Tulsa Law Review*, v. 38, 2002.

<sup>44</sup> BALKIN, Jack M. *Constitutional Redemption: Political Faith in an Unjust World*. Cambridge: Harvard University Press, 2011. p. 98.

*All this having been said, are the endings to all constitutional tales happy ones, and is the Constitution therefore necessarily worthy of respect, even from the interpreter who conscientiously follows the rule of charity in interpretation? The answer, alas, is no, unless one adopts the nominalist proposition that the Constitution is itself the source of all criteria of respect. In that case, as noted at the outset, the Constitution's "worthiness of respect" is tautological and trivial.<sup>45</sup>*

Levinson sees constitutional Protestantism as a way to avoid idolatry – for the individual who truly believes that the real Constitution is the one he sees, and not the one the Supreme Court sees, not to be obliged to nevertheless bow to the false Constitution the Court proclaims. In this sense, we can grasp a fundamental difference between Protestant and Catholic approaches to constitutional interpretation. It was the distinction that allowed Levinson to overcome his doubts in signing the Constitution by remembering Frederick Douglass and his commitment to a Constitution that then could only be imagined<sup>46</sup>. But this distinction, I believe, deserves a more charitable approach that the one Professor Levinson hints to.

It cannot be that all that is left to interpretative Catholicism is blindly bowing to false idols and idolatrizing a Constitution unworthy of respect. Naturally, this counter-conclusion derives in part from Professor Levinson's dramatic emphasis on the dangers of idolatry. The reality of constitutional practice is certainly not one in which the Constitution is transformed by the Supreme Court into a document unworthy of respect that must be rejected over the penalty of emptying the founding document of meaning and legitimacy. Good constitutional interpretation by the Supreme Court, to the point that goodness can be measured over one's standards of morality or political preferences, comes and goes throughout constitutional history. It is quite safe to affirm that interpretative Catholics feel just as bothered and affronted by decisions that derive from their views, not only personal but legal, on the realm of constitutional interpretation. So what can account for the differences in posture and attitude of these two strains of legal thought in the face of bad institutionalized constitutional interpretation?

The answer, I would say, is faith, but not the absence of faith, or better, misleading faith, that is suggested by Professor Levinson's hypothetical. Rather, I would call the difference between Catholics and Protestants in this scenario one of placement of faith<sup>47</sup>. Protestants of the second variety, such as Frederick Douglass, Professor Amar and Professor Levinson himself legitimize and justify interpreting the Constitution by its *results*. What constitutes good results will of course mean different things to them,

<sup>45</sup> LEVINSON, Sanford, **Constitutional Faith**. Princeton, N.J.: Princeton University Press, 2011. p. 87.

<sup>46</sup> LEVINSON, Sanford, **Constitutional Faith**. Princeton, N.J.: Princeton University Press, 2011.

<sup>47</sup> I must also attribute this construction to Professor Balkin, who called it *distribution of faith* in a different scenario.



even because Levinson is a Catholic as to the source of legal authority. Let's take Professor Amar. He believes in the strength and legitimacy of the political pact that originated the Constitution and in its superior authority granted by ratification, but he also has faith in the constitutional project he understands the founders to have envisioned. To him the work of that generation is worth protecting above the work of following generations. The only way he can maintain faith in the Constitution is by believing in those results, in their legitimacy, even when the United States Supreme Court does not pronounce it or agrees with them.

Professor Bobbitt's Catholicism, on the other hand, does not place its faith on results (or else, let's say that would be unwise, as he cannot control how the Supreme Court will interpret the Constitution). Rather, his faith is in the *process* of constitutional decision-making. Professor Bobbitt is a pure interpretative Catholic. This means he believes in tradition in a way that Protestants do not; he sees equal legitimacy in the work of the generations that came after the founding, their recurring constitutional practices, their precedents, and the work of original generation. This makes it difficult, makes it nearly impossible, to base one's faith on the constitutional system in results, because the basis on which to determine whether the results are good is a moving target. Unlike text, history and structure, tradition evolves, changes course, is later rejected. It is undetermined, just like Professor Bobbitt's conception of justice. This is why his approach to constitutional interpretation does not look at the justice of the results, but at the justice of the system, which is, for him, dependent upon its openness. He explains that:

*The United States Constitution formalizes a role for the conscience of the individual sensibility by requiring decisions that rely on the individual moral sensibility when the modalities of argument clash. We are tempted to think that, in a just system (a subject I will take up presently), we can presume that a particular outcome is just if there is no contradiction within the system. And most cases in the American system, despite the rhetoric of indeterminacy, are not deeply conflicted cases. When these conflicts occur, however, the system of constitutional interpretation proscribes a role for the individual conscience: it does not prescribe a particular outcome. Therefore, even if the system is just we may not presume that every outcome is just.<sup>48</sup>*

The conclusion of this point is already leading into my second one, which is coherence. Professor Levinson suggested that there was no rational relation between the two variables of his proposed ideal types, and one could just as easily be Catholic on one variety and Protestant on the other as stay in the same side of spectrum on both varieties. But this is true neither in religion nor in law. While there may exist good interpretative theories that are characterized as mixed typed within Levinson's varieties,

<sup>48</sup> BOBBITT, Philip C. **Constitutional Interpretation**. Cambridge: Blackwell Pub, 1991. p. 168.

his analogical is applicable to interpretative theories not only on the results of the division between Catholics and Protestants, but also on the reasons for the fundamental differences in their approaches to the interpretation of the bible. In this sense there are sound and rational reasons why opting for one side of the spectrum in one variety should lead to staying in the same side of the spectrum on the other.

Levinson hints on several of these rational factors when describing the religious approaches to interpretation. He observes that Catholics' perception of scripture as often "ambiguous and perplexing" has lead them to supplement it by unwritten tradition in order to reach certainty. And on that point he notes "there may be a special connection between the perception of an authoritative unwritten tradition and the need for a specific institutional authority that can articulate its claims"<sup>49</sup>. There is a fine balance between certainty and uncertainty in this system. Catholics opted to rely on unwritten traditions to escape the uncertainty of the text. But they chose to bestow upon unwritten traditions *independent* and *equal* authority. And traditions can be more undetermined than any open text, because traditions (unlike texts) actually change and evolve.

The only way to escape complete indeterminacy is to have a centralized interpretative authority that will determine meaning applicable to all. The opposite is true of Protestantism. If there was a reason to reject unwritten traditions and focus on text, it was to escape the church as the central interpretative authority. Text, no matter how open ended, is fixed. It offers a clear guide to interpretation. By conferring interpretative authority to text alone, the need for a centralized institution to be the single interpreter is lesser (because there is less of a risk of complete indeterminacy).

Indeterminacy in interpretation is inevitable, and it can be dealt with in different ways. However, what I have been calling purist theories, like Professor Amar's and Professor Bobbitt's (the way I read them) seem to strike a better balance between indeterminacy in the object of interpretation and indeterminacy in the locus of authority of interpretation than its mixed counterparts.

## 5. CONCLUSION

The study of constitutional interpretation often offers too many variables to allow for intelligible comparative efforts. One must choose a standard on which to measure differences and similarities, and still account for all the discrepancies that result from the fact that no two academics propose to answer the same question in the same way. By utilizing Professor Levinson's ideal types of constitutional interpretation, I hoped to highline the themes that stood out to me in Professors Amar and Bobbitt's jurisprudences, and to show why I believe that – albeit from very different perspectives – they are engaged in a same project of constitutional redemption.

<sup>49</sup> LEVINSON, Sanford, **Constitutional Faith**. Princeton, N.J.: Princeton University Press, 2011. p. 21.

## 6. REFERENCES

- AMAR, Akhil Reed. **America's constitution: a biography**. New York: Random House, 2006.
- AMAR, Akhil Reed. **America's Unwritten Constitution: The Precedents and Principles We Live By**. [s.l.]: Basic Books, 2015.
- AMAR, Akhil Reed. Civil Religion and Its Discontents. **Tex. L. Rev.**, v. 67, p. 1153–1591, 1989.
- AMAR, Akhil Reed. The Document and the Doctrine. **Harvard Law Review**, v. 114, p. 26, 2000.
- BALKIN, Jack M. **Constitutional Redemption: Political Faith in an Unjust World**. Probable First edition. Cambridge, Mass: Harvard University Press, 2011.
- BALKIN, Jack M. **Critical Legal Theory Today**. Rochester: Social Science Research Network, 2008. Available in: <<http://papers.ssrn.com/abstract=1083846>>. Access: 1 out. 2015.
- BALKIN, Jack M. **Living Originalism**. Reprint edition. [s.l.]: Belknap Press, 2014.
- BALKIN, J. M.; LEVINSON, Sanford. Constitutional Grammar. **Texas Law Review**, v. 72, p. 1771, 1993.
- BERGER, Raoul. **Government by judiciary**. Indianapolis: Liberty Fund, 1997.
- BICKEL, Alexander. **The Least Dangerous Branch: The Supreme Court At The Bar Of Politics**. New Haven: Yale University Press, 1986.
- BOBBITT, Philip. **Constitutional Fate: Theory of the Constitution**. New York: Oxford University Press, 1984.
- BOBBITT, Philip. Reflections Inspired by My Critics. **Texas Law Review**, v. 72, p. 1869, 1993.
- BOBBITT, Philip C. **Constitutional Interpretation**. Oxford, UK ; Cambridge, Mass., USA: Blackwell Pub, 1991.
- BORK, Robert H. **The Tempting of America**. New York: Free Press, 1997.
- DWORKIN, Ronald. **Taking Rights Seriously**. Cambridge: Harvard University Press, 1978.
- ELY, John Hart. **Democracy and Distrust: A Theory of Judicial Review**. Cambridge: Harvard University Press, 1980.
- FISS, Owen M. Objectivity and Interpretation. **Stanford Law Review**, San Francisco, 34, p. 739–763, 1982.
- GADAMER, Hans-Georg. **Truth and Method**. Reprint edition. London: Bloomsbury Academic, 2013.
- LEVINSON, Sanford. **Constitutional Faith**. With a New afterword by the author edition. Princeton: Princeton University Press, 2011.
- TUSHNET, Mark V. **Red, White, And Blue: A Critical Analysis Of Constitutional Law**. Lawrence: University Press of Kansas, 2015.
- UNGER, Roberto Mangabeira. **The Critical Legal Studies Movement: Another Time, A Greater Task**. London: Verso, 2015.